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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER ALVAREZ,

Defendant and Appellant.

B266390

(Los Angeles County
Super. Ct. No. KA108223)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Anthony J. Patti, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Javier Alvarez (defendant) was convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).¹ On appeal, defendant contends the trial court improperly excluded evidence of the victim's prior conviction for misdemeanor hit and run, which prejudiced him by removing a source of impeachment. We affirm the judgment.

BACKGROUND

A. Prosecution Evidence

The victim, Elder Sandoval, was homeless and collected cans as a means of support. Sandoval was an alcoholic and regularly drank one to two quarts of vodka per day. Sandoval initially testified that on the day of the incident he drank vodka. However, he then changed his testimony by saying he did not drink any vodka but merely had a bottle of vodka with him. Sandoval had been prescribed Zoloft for depression, but was not taking his medication at the time of the incident.

On November 1, 2014, Sandoval was in the front yard of an unoccupied house crushing cans he had collected for recycling. Sandoval saw defendant in a vehicle, entering the driveway of the home. Defendant exited his car, "pulled" a wooden "pole" from it, approached Sandoval, and "started calling [him] names and . . . insulting" him. Sandoval attempted to leave with his bicycle and bags of recyclables. Defendant used the pole to hit Sandoval's bicycle as well as Sandoval's head, face, shoulder, and hand. The beating caused Sandoval to "pass[] out." Sandoval

¹ A special allegation that defendant inflicted great bodily injury was found not to be true.

required stitches to repair a lacerated lip and it was likely that damage to a bone in his hand would require surgery.

Sandoval did not hit defendant with a flashlight. Although he owned a flashlight, it was attached to his bicycle as a source of illumination.

Pomona Police Officer Thomas de la Vega was on patrol when he heard yelling. He saw two men standing near the front yard of a residence. Defendant was holding what appeared to be a baseball bat. Defendant struck Sandoval at least four times and Sandoval collapsed to the ground. After de la Vega exited his patrol vehicle, he pointed his firearm at defendant and ordered him to stop. Defendant tossed the bat and lay on the ground.

B. Defendant's Evidence

Defendant entered the driveway of his house, and saw Sandoval in the front porch area of a nearby house. That house was vacant and had been vandalized several times. Defendant approached Sandoval and asked him "if he was okay." Sandoval became verbally abusive. Defendant told Sandoval to leave the premises. Sandoval then hit defendant several times with an 18 inch flashlight before dropping it. The two resorted to fisticuffs. Sandoval picked up a wooden object, which appeared to be a long wooden tool handle. Defendant gained control of the object and hit Sandoval.

Defendant had been convicted of insurance fraud, misuse of public funds, and grand theft of person and property. Although defendant was sentenced to five years of incarceration, he served only two and one-half years of that term.

DISCUSSION

A. Relevant Proceedings

Prior to trial, the prosecutor, during a hearing pursuant to Evidence Code section 402, told the trial court she had informed defense counsel of Sandoval's 2008 prior conviction for misdemeanor hit and run, in violation of Vehicle Code section 20002, subdivision (a). The prosecutor was unable to determine whether such a violation was a crime of moral turpitude, but believed it was not. She wanted to address it with the trial court "in the event that [she was] not correct."

The trial court inquired of defendant's counsel regarding his position on whether a conviction for misdemeanor hit and run is a crime of moral turpitude. Defendant's counsel responded by acknowledging the prosecutor made him aware of the conviction, and stated, "I haven't had an opportunity to research it." Because Sandoval had no felony convictions, defendant's counsel stated, "I would be more concerned with acts of violence on this type of case."

The trial court stated, "Well, then, as an indication, I tend to agree with [the prosecutor], that considering the wide variety of things that can be run into accidentally, intentionally, and in the modern cars, the relative absence of the ability to know immediately what's going on with your car from the inside with the radio on and soundproofing and everything else, you may well not realize you hit something until after you got home. Which would still lie within the ambit of a hit and run. And it could be a mailbox, it could be anything. [¶] So pending your scholarship over the weekend, [defendant's counsel], if you want to bring it back up, I don't think that's—I tend to agree with you, that the

homeless[ness] is going to impact . . . the jury . . . more than a hit and run from 2008. But we'll see what happens when you do a little light research." The subject of Sandoval's prior conviction was never mentioned again, even though he testified and was cross-examined by defendant's counsel.

B. Analysis

"[T]o preserve an alleged error for appeal an offer of proof must inform the trial court of the "purpose . . . and relevance of the excluded evidence" [Citation.] This is in accord with "the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court *on the ground sought to be urged on appeal*." [Citation.]' [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 108; *People v. Lucas* (2014) 60 Cal.4th 153, 233, disapproved on other grounds in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

During the Evidence Code section 402 hearing, the prosecutor argued Sandoval's 2008 prior conviction for misdemeanor hit and run was not admissible evidence because, she believed, it was not a crime of moral turpitude. When the trial court inquired of defendant's counsel regarding his position on the issue, he effectively said that he did not have a position because he had not "research[ed] it." A fair reading of the reporter's transcript of the hearing is the trial court excluded the evidence, but invited defendant's counsel, after he conducted research, to "bring [the issue] back up" if he deemed it appropriate. Defendant's counsel however never raised the issue again; he did not present an offer of proof or any argument supporting the admission of the challenged evidence.

Defendant conceded to the exclusion of the evidence by not arguing at the Evidence Code section 402 hearing, or at any time thereafter, that the evidence of Sandoval's 2008 prior conviction for misdemeanor hit and run was admissible and the reasons why it was admissible. Indeed, at no time did defendant seek to introduce the evidence. Defendant has not preserved the alleged error for appeal.²

² It is notable that "misdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying *conduct* may be admissible subject to the court's exercise of discretion." (*People v. Chatman* (2006) 38 Cal.4th 344, 373, citing *People v. Wheeler* (1992) 4 Cal.4th 284, 297-300.) Defendant did not argue the conduct underlying the conviction was admissible. This only adds to the legitimacy of applying forfeiture principles.

DISPOSITION

The judgment is affirmed.

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KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.